EDITOR'S NOTE

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CASE NUMBER: 86-758

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF FLORIDA

PETITIONER,

VS.

JEFFREY NEASE A/K/A MICHAEL COLWELL A/K/A LOUIS POYNTER,

RESPONDENT.

RECEIVED
JAN 29 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION AND AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW THE RESPONDENT, MICHAEL COLWELL, BY AND THROUGH UNDERSIGNED COUNSEL, WHO MOVES THIS HONORABLE COURT TO ENTER AN ORDER PERMITTING THE RESPONDENT LEAVE TO PROCEED IN FORMA PAUPERIS BEFORE THIS HONORABLE COURT. AS GROUNDS, THE RESPONDENT, THE DEFENDANT BELOW, WOULD SHOW AS FOLLOWS:

1. THAT THIS IS THE SECOND TIME THAT THE DEFENDANT HAS BEEN PUT TO THE TERRIBLE EXPENSE OF PROCEEDING THROUGH THE ENTIRE APPELLATE COURT OF THE STATE OF FLORIDA, AND BEFORE THIS HONORABLE COURT.

2. THE LEAVE TO APPEAR IN FORMA PAUPERIS HAS NOT BEEN SOUGHT ON BEHALF OF THE RESPONDENT IN ANY LOWER COURT PROCEEDING.

3. That because of a back injury, suffered a long time ago in Ohio, which is the subject of workman's compensation, the Defendant has not been able to be substantially gainfully employed in some sort of an occupation that would allow him to pay his attorney the substantial fees that have accrued during the last five years.

4. That the Respondent has not been able to pay his counsel fees since these matters became subject to appellate review in the year of 1982.

5. That the Petitioner has been through the judicial court system, including the appellate courts and The Supreme Court of Florida, three times at this particular juncture, and has cavalierly moved to have the instant case reconsidered a second time.

6. That the Respondent does not have money with which to pay counsel and would represent to this Court that at this present time, he can avail himself of no funds, either from his family, friends or earnings, with which to pay counsel either the substantial funds of appellate fees that are currently due and owing, nor the amount of money required for representation before this Court.

7. The Respondent would further state that he has not disposed of any assets for financial gain within

THE PERIOD OF THE LAST YEAR, AND CURRENTLY DOES NOT HAVE ANY ASSETS OF ANY SORT IN HIS POSSESSION OR IN THE POSSESSION OF ANY THIRD PARTIES.

8. THAT WERE IT NOT FOR THE FACT THAT THE RESPONDENT'S COUNSEL WAS PAID FOR THE INITIAL MATTERS IN THIS CASE AND IN THE COMPANION CASES, AND WERE IT NOT FOR THE CONCERN THAT HIS COUNSEL HAS FOR THE DEFENDANT THAT THESE MATTERS BE RESOLVED IN A PROPER FASHION, THE RESPONDENT WOULD CURRENTLY STAND BEFORE THIS COURT WITHOUT REPRESENTATION OF ANY SORT.

9. THAT THE RESPONDENT'S COUNSEL HAS NOT RECEIVED ANY MONEY FROM EITHER FRIENDS OR FAMILY ON THE RESPONDENT'S BEHALF DURING THE PERIOD OF THE LAST FIVE YEARS, WHILE THE RESPONDENT'S CASES HAVE BEEN PROCEEDED THROUGH THE APPELLANT SYSTEM IN THE STATE OF FLORIDA AND BEFORE THIS COURT, BOTH NOW AND AT AN EARLIER TIME.

10. THAT UPON A CONSIDERATION OF ALL OF THESE MATTERS, THE RESPONDENT WOULD REQUEST THIS COURT TO ENTER AN ORDER PERMITTING THE RESPONDENT, THROUGH HIS COUNSEL, TO PROCEED IN FORMA PAUPERIS, BEFORE THIS COURT, SUBJECT TO SUCH CONDITIONS THAT THIS COURT MAY DEEM FIT AND PROPER.

WHEREFORE, THE RESPONDENT, MICHAEL COLWELL, MOVES THIS COURT THAT THE ABOVE-REQUESTED RELIEF ISSUE INSTANTER.

STATE OF FLORIDA
COUNTY OF BROWARD

BEFORE ME, THE UNDERSIGNED AUTHORITY, THIS DAY PERSONALLY APPEARED STEPHEN J. FINTA, WELL KNOWN TO ME TO BE THE PERSON WHO, AFTER BEING DULY SWORN, STATES THAT THE ABOVE REPRESENTATIONS ARE TRUE AND CORRECT, AND THAT HE IS EXECUTING THE FOREGOING ON BEHALF OF THE RESPONDENT DUE TO THE UNAVAILABILITY OF THE RESPONDENT.

STEPHEN J. FINTA

SWORN TO AND SUBSCRIBED BEFORE ME THIS 28th DAY OF JANUARY, 1987.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APR. 24 1989
BONDED THROUGH NOTARY PUBLIC UNDERWRITERS, INC.

NOTARY PUBLIC

My Commission Expires:

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING AS FURNISHED, BY MAIL, TO JOY B. SHEARER, ESQUIRE, ASSISTANT ATTORNEY GENERAL, 111 GEORGIA AVENUE, SUITE 204, WEST PALM BEACH, FLORIDA 33401 THIS 28th DAY OF JANUARY, 1987.

RESPECTFULLY SUBMITTED,

STEPHEN J. FINTA, ESQUIRE
3015 NORTH OCEAN BOULEVARD, #122
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(305) 537-5565
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BY:

CASE NUMBER: 86-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF FLORIDA
PETITIONER,
VS.
JEFFREY NEASE A/K/A MICHAEL COLWELL
A/K/A LOUIS POYNTER,
RESPONDENT.

NOTICE OF APPEARANCE OF COUNSEL

THE CLERK WILL PLEASE ENTER MY APPEARANCE AS COUNSEL FOR JEFFREY NEASE A/K/A MICHAEL COLWELL A/K/A LOUIS POYNTER, WHO IN THIS COURT IS THE RESPONDENT.

I CERTIFY THAT I AM A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES.

RESPECTFULLY SUBMITTED,

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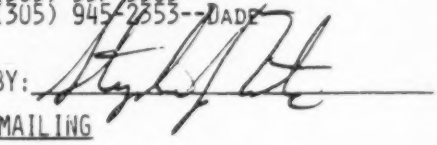
BY: 

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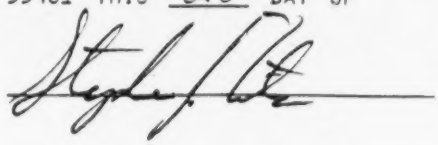

CASE NUMBER: 86-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF FLORIDA,
PETITIONER,
VS.
JEFFREY NEASE A/K/A MICHAEL COLWELL
A/K/A LOUIS POYNTER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE STATE DISTRICT COURT OF APPEALS,
FOURTH DISTRICT, IN THE STATE OF FLORIDA
RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN J. FINTA, ESQUIRE
COUNSEL TO THE RESPONDENT
SUITE 122
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FORT LAUDERDALE, FLORIDA 33308
TELEPHONE: (305) 537-5565

QUESTIONS PRESENTED

I.

WHETHER THE FOURTH DISTRICT COURT OF APPEALS INCORRECTLY HELD THAT THE DEFENDANT'S RUNNING AWAY WHEN THE SEARCH OF HIS LUGGAGE WAS ABOUT TO BEGIN WAS A WITHDRAWAL OF THE CONSENT TO SEARCH AS OPPOSED TO AN ABANDONMENT OF HIS LUGGAGE?

II.

WHETHER WHEN A TRAVELER IS SUBJECTED TO A LAWFUL CUSTODIAL ARREST AT A CONGESTED AIRPORT TERMINAL CONCOURSE, DOES THE CONSTITUTIONAL PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO HIS LAWFUL ARREST INCLUDE THE LUGGAGE WHICH HAS BEEN CONTEMPORANEOUSLY SECURED BY THE OFFICERS?

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OPINIONS BELOW

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA IS REPORTED AT 484 So.2D 67 (FLA. 4TH D.C.A. 1986).

JURISDICTION

JURISDICTION IS SOUGHT PURSUANT TO 28 U.S.C. §1257(3).

FEDERAL CONSTITUTIONAL PROVISIONS INVOKED

THE RESPONDENT WOULD ACCEPT THE PETITIONER'S VERSION OF THE CONSTITUTIONAL PROVISION AT ISSUE.

STATEMENT OF THE CASE

THE RESPONDENT ACCEPTS THE PETITIONER'S VERSION OF THE FACTS IN THIS CASE WITH THREE VERY IMPORTANT DIFFERENCES. AFTER NOTING THE DISCREPANCY IN NAMES BETWEEN THE RESPONDENT'S AIRPLANE TICKET AND HIS PERSONAL IDENTIFICATION, THE OFFICERS THEN REIDENTIFIED THEMSELVES AS NARCOTICS OFFICERS AND ASKED THE RESPONDENT TO ACCOMPANY THEM TO A REMOTE SMALL STORAGE AREA TO BE SEARCHED. THE OFFICERS THEN CALLED OUT THE BAGGAGE CHECK NUMBERS TO OTHER OFFICERS TO GRAB THE RESPONDENT'S LUGGAGE. IT SPECIFICALLY BEARS NOTE THAT THE RESPONDENT'S CONSENT TO SEARCH, AFTER BEING ASKED TO GO TO THE REMOTE AREA WAS A CONSENT TO SEARCH THE RESPONDENT'S HAND BAGGAGE ONLY.

LASTLY, ONE OF THE ARRESTING OFFICERS, AGENT DECOURSEY, STATED THAT HE DID NOT TELL THE RESPONDENT THAT HE WAS FREE TO GO, AND FREE TO REFUSE HAVING HIS LUGGAGE SEARCHED. MR. DECOURSEY'S SOLE JUSTIFICATION FOR ARRESTING THE RESPONDENT AS HE RAN AWAY FROM THE PLANNED SEARCH WAS THE FACT THAT HE RAN AWAY, VIEWED IN CON-

JUNCTION WITH HIS ALLEGED NERVOUSNESS AND THE DIFFERENCE IN NAMES BETWEEN Mr. COLWELL'S AIRPLANE TICKET AND HIS PERSONAL IDENTIFICATION.

THE RESPONDENT'S REASONS FOR NOT GRANTING THE WRIT

THIS COURT HAS HAD THE OPPORTUNITY TO REVIEW A CASE HAVING A REMARKABLE FACTUAL SIMILARITY TO THIS CASE, IN THE CASE OF REID V. GEORGIA, 448 U.S. 438 (1980). IF THE COURT'S REASONING HAD BEEN MORE CLEARLY ARTICULATED IN REID, SUPRA, THE PETITIONER'S ARGUMENT WOULD PROBABLY BE UNAVAILABLE TO THEM IN THIS CASE*! IT IS SUBMITTED, HOWEVER, THAT THE PETITIONER'S AREA OF FOCUS PLACES THE CART BEFORE THE HORSE. IN SCRUTINIZING THE EXACT MOMENT WHEN A TRANSGRESSION OF AN INDIVIDUAL'S FOURTH AMENDMENT RIGHTS TAKES PLACE, IT IS NECESSARY THAT THE TYPE OF STOP BE CAREFULLY GLEANED FROM THE FACTS. THE DISTRICT COURT OF APPEALS FOUND THAT THIS CASE STARTED OUT AS A CONSENSUAL CITIZEN-POLICE ENCOUNTER. IT IS PRECISELY AT THAT POINT, THAT IT ERRED IN THE MOST RECENT DECISION, BY FAILING TO CONSIDER THE CLEAR IMPORT OF CONSTITUTIONAL FACTS. SPECIFICALLY, WHEN THE POLICE OFFICER REIDENTIFIED THEMSELVES AND ASKED THE RESPONDENT TO ACCOMPANY THEM TO A REMOTE AREA TO HAVE HIS PERSONAL HAND BAGGAGE SEARCHED, WELL ARTICULATED PRECEDENT IN THE ELEVENTH AND IN THE FIFTH CIRCUITS MANDATED THAT JUDICIAL OPINION BE RESOLVED

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* IT BEARS NOTE THAT EVEN IF THIS CASE WAS REVERSED IN FAVOR OF THE PETITIONER, THAT WOULD NOT END THE MATTER. IN A CONTEMPORANEOUS COMPANION CASE, POYNTER V. STATE, 443 So.2D 219 (4TH D.C.A. 1983) THE SAME FOURTH DISTRICT COURT OF APPEALS IN THE STATE OF FLORIDA RULED THAT THE RESPONDENT WAS INCOMPETENT TO STAND TRIAL. BECAUSE THE RESPONDENT WAS NEVER READJUDICATED COMPETENT IN THIS CASE, AND BECAUSE OF COLLATERAL ESTOPPEL, NOTHING WOULD CHANGE IN THIS CASE.

TO PRESUME THE RESPONDENT WAS UNDER ARREST FOR PURPOSES OF THE FOURTH AMENDMENT.

IN UNITED STATES V. ELSOFFER, 671 F.2D 1294 (11TH CIR. 1982), THE ELEVENTH CIRCUIT FOUND HAT THE RETENTION OF A SUSPECTS TICKET STRONGLY SUGGESTED HE WAS UNDER ARREST. CONTINUING ON, THE COURT STATED AS FOLLOWS:

> . . . OUR HOLDING WOULD NOT DIFFER . . . EVEN IF THE RECORD WAS CLEAR IN SHOWING THAT THE AGENTS HAD RETURNED ELSOFFER'S DOCUMENTS BEFORE ASKING HIM WHETHER HE WOULD CONSENT TO A SEARCH OR GO TO A LOUNGE. WE DO NOT BELIEVE THAT AFTER A RETURN OF THE DOCUMENTS RETAINED DURING INTERROGATION, FOLLOWED BY REQUESTS TO CONSENT TO A SEARCH AND GO TO AN OFFICE, AN INDIVIDUAL WOULD FEEL THAT HIS DETENTION HAD ENDED.
> 671 F.2D AT 1298 N.7

ALSO IN ACCORD, SEE UNITED STATES V. WAKSAL, 709 F.2D 653 (11TH CIR. 1983).

IN UNITED STATES V. BERRY, 670 F.2D 583 (5TH CIR. 1982), THE COURT STATED AS FOLLOWS:

> WE DO NOT WISH TO SHACKLE POLICE ABSOLUTELY TO A RIGID AND AWKWARD RULE REQUIRING THEM TO INFORM INDIVIDUALS THAT THEY ARE FREE TO NOT ACCOMPANY POLICE TO AN OFFICE, BUT WE DO BELIEVE THAT ONLY EXCEPTIONALLY CLEAR EVIDENCE OF CONSENT SHOULD OVERCOME A PRESUMPTION THAT A PERSON REQUESTED TO ACCOMPANY AN AGENT TO AN OFFICE NO LONGER WOULD FEEL FREE TO LEAVE. SUCH A REQUEST COMBINES A SUBSTANTIAL INTRUSION ON AN INDIVIDUAL'S FREEDOM, A MARKED INCREASE IN THE COERCIVE NATURE OF THE ENVIRONMENT IN WHICH THE INDIVIDUAL WILL BE RESPONDING TO POLICE, AND SUBSTANTIAL PSYCHOLOGICAL COERCION FROM THE INTIMATION THAT THERE IS STRONG SUSPICION THAT AN INDIVIDUAL IN INVOLVED IN CRIMINAL CONDUCT . . .

EVEN VERBAL AGREEMENT TO ACCOMPANY AN OFFICER SHOULD BE SCRUTINIZED EXCEPTIONALLY CLOSELY TO ENSURE A COMPLETE ABSENCE OF COERCIVE INFLUENCE. 670 F.2D 598

BASED UPON UNEQUIVOCAL PRECEDENT, THE RESPONDENT WAS UNDER ARREST WHEN THE POLICE REIDENTIFIED THEMSELVES AND ASKED HIM TO ACCOMPANY THEM TO A REMOTE WAREHOUSE TO BE SEARCHED. THESE FACTS, UNDISPUTED AS THEY ARE, CONSTITUTE THE FOCAL POINT OF ANALYSIS IN THIS CASE. NOT ONLY WAS THE RESPONDENT UNDER ARREST IMPROPERLY WITHOUT PROBABLE CAUSE, BUT ANY CONSENT TO SEARCH GIVEN BY HIM WAS IRREPARABLY TAINTED BY THE IMPROPER STOP. SEE BROWN V. ILLINOIS, 442 U.S. 590 (1975); DUNAWAY V. NEW YORK, 442 U.S. 200 (1979). ADDITIONALLY, THE CONSENT TO SEARCH, UNATTENUATED FROM THE ILLEGAL STOP, WAS ALSO NOT EXCEPTIONALLY CLEAR. UNITED STATES V. BERRY, SUPRA.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DECISION FIRST REACHED BY THE STATE DISTRICT COURT OF APPEALS WAS THE APPROPRIATE DECISION, BUT FOR THE WRONGLY ARTICULATED REASONS. THE DECISION LAST REACHED BY THE STATE DISTRICT COURT OF APPEALS WAS CORRECT AS IT RELATED TO THE SUPPRESSION OF THE COCAINE FROM THE RESPONDENT'S LUGGAGE, BUT INCORRECT AS IT RELATES TO THE METHAQUALONE FOUND ON THE RESPONDENT'S PERSON. MR. COLWELL WAS ILLEGALLY ARRESTED. EVERYTHING THAT HAPPENED THEREAFTER WAS IMPROPER, UNDER THE CIRCUMSTANCES OF THE CASE AND THE SEARCH AND SEIZURE OF THE RESPONDENT AND HIS LUGGAGE. NOT ONLY DOES THE ILLEGAL ARREST UNDER THE FOURTH AMENDMENT TAINT ANY SUBSEQUENT CONSENT*, BUT THE ILLEGAL ARREST

*THERE IS A QUESTION AS TO THE SCOPE OF THE CONSENT, SINCE THE AGENT THAT SPOKE TO COLWELL ASKED FOR HIS CONSENT TO SEARCH HIS HAND LUGGAGE.

ALSO CREATES IMPROPER FIFTH AMENDMENT TAINT, BECAUSE HE WAS NEVER GIVEN HIS MIRANDA WARNINGS WHEN HE WAS IMPROPERLY ARRESTED. ASKING HIM ABOUT HIS LUGGAGE UNDER CIRCUMSTANCES WHERE HE WAS ALREADY UNDER ARREST, PLACED BEFORE HIM THE CHOICE OF CONSENTING, ABANDONING OR INCRIMINATING HIMSELF. RHODE ISLAND V. INNIS, 446 U.S. 291 (1980).

THIS CASE WAS VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF FLORIDA V. RODRIGUEZ, 469 U.S. 1 (1984). A JUSTICE STEVENS LAMENTED IN HIS DISSENT IN RODRIGUEZ, SUPRA, IT IS HIGHLY UNUSUAL FOR THIS COURT TO UNDERTAKE DE NOVO REVIEW OF FACTUAL FINDINGS OF A STATE COURT ON THE ARTICULABLE SUSPICION ISSUE. IN VACATING THE STATE DISTRICT COURT'S DECISION LAST TIME, THE COURT STOPPED SHORT OF A DE NOVO FACTUAL HEARING. THE ONLY QUESTION WAS THE APPROPRIATE STANDARD BEING APPLIED. THE STATE COURT OF APPEALS HAS BEEN CONFUSED BY THE COURT'S ORDER VACATING AND REMANDING THE CASE. HOWEVER, THE CLEAR PRECEDENT APPLICABLE IN THE ELEVENTH AND FIFTH CIRCUITS LEAVES NO DOUBT AS TO THE EFFICACY OF THE FIRST DECISION. NEASE V. STATE, 442 So.2D 325 (4TH D.C.A. 1983). TO THE EXTENT THAT THE STATE COURT OF APPEALS, ON REMAND FROM THIS COURT, FAILED TO SUPPRESS EVERYTHING, IT WAS IN ERROR IN THE SCOPE OF ANALYSIS. HOWEVER, THE RESPONDENT DOES NOT TAKE ISSUE WITH THE FAILURE OF THE STATE COURT OF APPEALS TO SUPPRESS THE METHAQUALONE, SINCE IT WAS NOT RAISED BEFORE THE FLORIDA SUPREME COURT BY THE RESPONDENT.

LASTLY, THE RESPONDENT WOULD SUBMIT THAT THE PETITIONER HAS ARTFULLY AVOIDED A PROPER FOURTH AMENDMENT ANALYSIS AND HAS RAISED ISSUES THAT COULD HAVE BEEN AND SHOULD HAVE BEEN RAISED IN THE STATE'S FIRST REQUEST FOR REVIEW IN THIS COURT; FOR INSTANCE THE ISSUE OF CONSENT AND ABANDONMENT. HERE, THE ISSUE OF REVOCATION OF CONSENT

TO SEARCH AS ARTICULATED IN Hease v. State, 484 So.2d 67 (Fla. 4th D.C.A. 1986) and Jacobson v. State, 476 So.2d 1282 (Fla. 1983) is a state issue, the resolution of which adequately decides this case, and should serve as an alternate basis to deny review in this Court. Michigan v. Long, 463 U.S. 1032 (1983).

CONCLUSION

Certiorari should be denied for the reasons set forth herein. The arresting agent agreed that he only tackled Mr. Colwell because of him allegedly fitting the profile and because he ran away, thereby revoking his consent as matter of State of Florida law.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing was furnished, by U.S. Mail, to Joy B. Shearer, Esquire, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 28th day of January, 1987.

Respectfully submitted,

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BY: _____